



April 1, 2013

*Via electronic mail*

Mr. David Gibson  
Executive Officer and Members of the Board  
California Regional Water Quality Control Board, San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123  
Email: [wchiu@waterboards.ca.gov](mailto:wchiu@waterboards.ca.gov)

***Re: Request of NRDC, San Diego Coastkeeper, and Orange County Coastkeeper/Inland Empire Waterkeeper for Party Status and Request for San Diego Regional Board to Delay Hearing on the San Diego Regional MS4 Permit and Reissue the Permit for Public Comment.***

Dear Mr. Gibson:

On behalf of the Natural Resources Defense Council (“NRDC”), the San Diego Coastkeeper (“SDCK”), and the Orange County Coastkeeper (“OCCK”)/Inland Empire Waterkeeper (“IEWK”), we are writing with regard to the San Diego Regional Water Quality Control Board (“Regional Board”) Hearing on the Tentative National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region, Tentative Order No. R9-2013-0001, NPDES Permit No. CAS0109266 (“Tentative Order”), scheduled for April 10-11, 2013 (“Permit Hearing”).

**I. NRDC, SDCK, and OCCK Request Party Status for the Permit Hearing**

Pursuant to Public Notice issued by the Regional Board on March 27, 2013 for the April 10-11, 2013 hearing on the Tentative Order, the NRDC, SDCK, and OCCK/IEWK (collectively, “Environmental Groups”) each hereby request party status. Environmental Groups have been deeply involved with the permit process for the draft Tentative Order and have been among the most active public interest organizations in the stormwater and urban runoff field in southern California, particularly in San Diego, Orange, and Riverside Counties, investing an enormous effort over many years to reduce water quality degradation related to stormwater runoff.

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**A. NRDC, SDCK, and OCCK/IEWK Have Direct and Substantial Interests in This Proceeding that Justify Their Designation as Parties**

First, Environmental Groups represent members who recreate in the waters to which the Tentative Order regulates discharges of stormwater runoff. The groups' members are impacted by pollution in stormwater runoff and its resulting health impacts, and by beach closures which restrict the ability of residents and visitors in San Diego, Orange, and Riverside Counties to use the beach and other local waters for recreation and other purposes.

Second, Environmental Groups submitted extensive written comments and expert analysis on the Tentative Order on January 11, 2013. NRDC and SDCK additionally submitted written comments on prior staff working proposals for the permit on September 14, 2012. Environmental Groups also presented testimony at the Regional Board Meeting on the draft Tentative Order on November 13, 2012, and SDCK and OCCK/IEWK participated in the Regional Board meeting on the Tentative Order on December 12, 2012, and in stakeholder discussions convened by Regional Board staff on the Tentative Order on July 11, July 25, and August 22, 2012. SDCK participated in additional stakeholder discussions on June 27 and October 24, 2012. Each of our organizations have also met with other stakeholders, representatives of the building industry, permittees, elected officials, and Regional Board staff to discuss draft permit terms on numerous additional occasions in 2012 and 2013. We have worked throughout the drafting process to ensure the adopted Order will meet the requirements of federal and state law, and achieve relevant requirements for water quality in San Diego, Orange, and Riverside Counties.

Third, Environmental Groups have a long history of working to adopt, strengthen and enforce prior MS4 permits for San Diego, Orange, and Riverside Counties, the TMDLs these permits implement, and the water quality standards that they are designed to achieve. For example, SDCK and NRDC successfully intervened in a lawsuit filed by the Building Industry Association of San Diego County against the Regional Board challenging the 2001 San Diego County MS4 permit, including the permit's application of water quality standards to stormwater. (See, *Building Industry Association of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866.) The California Appellate Court rejected the Building Industry's arguments and found that the Permit's restrictions on pollutant discharges were lawful. (*Id.*)

NRDC and SDCK were both active in Regional Board proceedings regarding the 2007 San Diego MS4 Permit and subsequent adoption process for the San Diego Countywide SUSMP, attending stakeholder meetings, submitting written comments and expert reports, and presenting testimony at Regional Board hearings.<sup>1</sup> NRDC additionally

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<sup>1</sup> See, e.g., NRDC and SDCK letters to Regional Board on Nov. 7, 2008 letter to San Diego County, and Feb. 23, 2009 letter to Regional Board re: Countywide SUSMP.

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petitioned the adoption of the 2007 San Diego MS4 Permit before the State Board in 2007, though voluntarily dismissed the petition in 2010.

NRDC participated in proceedings before the Regional Board for the adoption of the 2009 Orange County MS4 Permit for Region 9, including submitting comments, participating in stakeholder meetings convened by the Regional Board, and presenting testimony at Board hearings on the Permit.<sup>2</sup> NRDC also submitted written comments on the 2010 Permit for Riverside County within Region 9.<sup>3</sup> OCCK/IEWK have additionally brought approximately 40 third-party civil actions in federal court in the surrounding region over the past decade, focused on improving water quality and enforcement of the federal Clean Water Act. Our organizations have substantial interest in the quality of the region's waters generally, and in this proceeding specifically.

**B. Without Party Status, the Action of the Board May Impair Environmental Groups' Ability to Protect Their Interests**

The disposition of this action may impair or impede Environmental Groups' ability to protect their interests in several ways. Most notably, Environmental Groups members recreate in the waters the Tentative Order regulates discharges of stormwater discharges for. As detailed above, Environmental Groups have a long history of working to adopt and strengthen the same stormwater permits now proposed for coverage under the Tentative Order, as well as the Tentative Order itself, both in the administrative arena before this Board and as a party in other actions. In the event we are denied party status, and additional substantive changes to the Tentative Order are made at the hearing that contravene the interests of Environmental Groups, or in the event that provisions in the Order which fail to meet the requirements of state or federal law are not corrected at the Permit Hearing, our participation to this point will have been rendered a meaningless exercise. This action's disposition may further directly affect Environmental Groups' ability to protect their interests as they relate to further administrative proceedings concerning the implementation of the Tentative Order or TMDLs incorporated within it, or our interests related to any potential action challenging the Tentative Order before the State Board or in Superior Court.

Clean Water Act regulations explicitly require that agencies shall "provide for, encourage, and assist the participation of the public" and use "all feasible means to create opportunities for public participation, and to stimulate and support public participation." (40 C.F.R. §§ 25.3(a), (c)(7).) Given Environmental Groups' clear past and present

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<sup>2</sup> See, e.g., NRDC letters to Regional Board on Aug. 22, 2007, May 15, 2009, June 19, 2009, Sept. 28, 2009, and Dec. 12, 2009, regarding the draft MS4 Permit for South Orange County.

<sup>3</sup> See NRDC letter to Regional Board on August 13, 2010 re: draft MS4 Permit for Riverside County.

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interests in the adoption and enforcement of the Tentative Order, the Regional Board should grant our request for Party Status.

**C. Environmental Groups' Interests Are Not Adequately Represented by the Existing Parties to this Hearing**

The current parties to these permit proceedings are municipal and county entities that will be regulated under the Tentative Order and ultimately responsible for implementing the requirements it imposes. Conversely, Environmental Groups are nonprofit organizations focused on protecting San Diego, Orange, and Riverside Counties' aquatic resources and its inland waterway users and beachgoers. Environmental Groups have throughout the Tentative Order drafting process presented, and undoubtedly will at the hearing present, arguments that are in opposition to positions taken by the existing parties and will add necessary elements to the hearing that the existing parties will likely neglect. These include full discussion of the impacts and costs of failing to adequately reduce pollution in stormwater runoff; providing discussion of federal and state legal requirements that mandate many of the terms contained in the Tentative Order, including the Order's Receiving Water Limitations ("RWLs"), TMDL, and Low Impact Development Requirements; discussion of the federal process for adoption of the permit and that this process cannot be undercut by state law; and presentation of case studies, scientific research, and other documentation demonstrating the feasibility of terms in the Tentative Order or of additional provisions that are currently lacking in the Tentative Order. As no existing or other party will adequately represent the Environmental Groups and their unique interests, they are properly given party status here.

Environmental Groups are regular, consistent participants in water quality matters large and small before the Regional Board, State Board, as well as in litigation related to water quality issues, including directly involving the MS4 permit for San Diego County. We have been deeply involved with the adoption process for the draft Tentative Order for nearly a year. As such, we each request designation as a party to the proceeding.

**II. Environmental Groups Request 50 minutes for Presentation and Hearing Practice**

Environmental Groups request that the Regional Board allocate to them a total of fifty (50) minutes of time for presentation, cross examination, and rebuttal as necessary. This time would be divided roughly as follows: Presentation (35 minutes); Cross-Examination of Staff/Witnesses/Other Parties (as needed, 10 minutes) and time for rebuttal or remaining hearing practice (5 minutes). This amount of time is necessary to ensure a proper vetting of the issues and complexities raised by the Tentative Order and comments submitted by permittees.

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**III. Environmental Groups Request that the Regional Board Designate a Time or Date Certain for Public Comment at the Permit Hearing**

Environmental Groups appreciate the Regional Board's past effort to establish a date certain for their presentation at the Permit Hearing. However, in light of the potential changes to the hearing procedure signaled by the Regional Board in its March 27, 2013 letter, and in order to accommodate the travel and lodging needs of representatives of the Environmental Groups, we respectfully request that, to the extent possible, the Regional Board confirm the date certain no later than Friday, April 5, 2013.

**IV. Designated Contact for Receipt of Notices About this Proceeding**

Communications related to this proceeding or to the Environmental Groups' request for Party Status may be directed to:

Noah Garrison  
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**V. Environmental Groups Object to the Potential Adoption of the Tentative Order at the Permit Hearing, and Request that the Regional Board Reissue the Tentative Order for Public Comment.**

On March 27, 2013, the Regional Board released a revised draft Tentative Order that contained sweeping, substantive changes from the previously issued draft released for public comment on October 31, 2012. Courts have found that where a "final rule deviates too sharply from the proposal," interested or "affected parties will have been deprived of notice and an opportunity to respond to the rule." (*Natural Resources Defense Council, Inc. v. U.S.EPA.* (9th Cir. 1988) 863 F.2d 1420, 1429.) Such a situation is presented here. In particular, changes to the Tentative Order's Water Quality

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Improvement Plan requirements under section II.B., including a “safe harbor” provision under section II.B.3.c., which renders the permit’s overarching receiving water limitation’s prohibition against discharges that “cause or contribute to the violation of water quality standards in any receiving waters” inoperative in certain circumstances, represent a significant change from the prior version of the Tentative Order.

The potential repercussions of this new language, which involve complex, technical matters that entirely alter the overall framework for enforcement of the Tentative Order, cannot be properly evaluated or responded to in the short time frame remaining prior to the currently specified Permit Hearing dates of April 10-11. Should the Regional Board elect to proceed with adoption of the Tentative Order on April 10-11, Environmental Groups, as well as other affected parties will be deprived of proper opportunity to respond to the proposed permit provisions. As a result, we respectfully request that the Regional Board delay the proceeding, and reissue the permit for additional public comment.

**VI. Conclusion**

Environmental Groups request party status to the April 10-11 Hearing on the Tentative Order. However, Environmental Groups also request that the Regional Board delay this proceeding, and reissue the Tentative Order for further public comment. Environmental Groups further reserve our right to raise objections on procedural or other grounds that may arise during, or prior to, the Permit Hearing. Thank you for your attention to this matter, and please do not hesitate to contact us with any questions you might have.

Sincerely,



Noah Garrison  
Project Attorney  
Natural Resources Defense Council

/s/

Jill Witkowski  
Waterkeeper  
San Diego Coastkeeper

/s/

Colin Kelly  
Staff Attorney  
Orange County Coastkeeper  
Inland Empire Waterkeeper